



Dkt. #2426 at 2-3. Thus, it is uncontested that use of indicator bacteria is the current method for assessing aquatic microbial human health risks as a matter of Oklahoma law. Indeed, indicator bacteria-based standards are the only such standards in existence. Therefore, Defendants' arguments and evidence concerning as yet unarticulated future water quality standards have no conceivable relevance to any issue in the case at bar. At the very least, such speculative argument and evidence could only confuse the true issues in this case and prejudice the State.

2. The Court has recently rebuffed Defendants' attempt to call into question the use of indicator bacteria in the current water quality standards:

COUNSEL: . . . [Y]ou remember the whole issue, Your Honor, over the water quality standards that were promulgated by EPA in 1986 that were based entirely on human-impacted waters. And we've put in some evidence that EPA is now reconsidering those in light of the fact that they don't necessarily bear the same health risk conclusions when you're dealing with water that's only impacted by animal sources. Dr. Harwood relies on those, but those assume full body emersion, which is head under water, completely in the river. But at her deposition, she acknowledged she has got no idea how often recreators in the IRW are fully emersed in the water. She also testifies she doesn't know –

THE COURT: Frankly, I don't know that you want to raise that. I mean, clearly people's heads go under the water when they're canoeing, when they're recreating in the IRW. Do you really want to go there? That really doesn't pass the smell test.

COUNSEL: Your Honor, I'm not saying it doesn't happen, but I'm saying that simply numerically applying the EPA's 17 per thousand estimation to the number of recreators in the IRW, the number given by Dr. Caneday in factoring out how many sick people there must be out there, even though they can't be found -- and that's what Dr. Harwood would love to do. But that's not an analysis that she has the basis to do, to provide.

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THE COURT: I'm not persuaded.

COUNSEL: Then that's on me, Your Honor.

THE COURT: I doubt if you or Mr. George would send your children down to the IRW if we knew that there was fecal indicator bacteria there and just tell them just don't stick your head under the water. You know, that just doesn't pass the test. I'm sorry . . .

Ex. 1 (7/28/09 Tr. pp. 168-69).

3. Indeed, in February 2009, EPA published a “white paper” reaffirming the value of indicator bacteria in assessing aquatic health risks associated with fecal bacteria. Ex. 2 (EPA, “Review of Zoonotic Pathogens in Ambient Waters” at 1) (“Water quality criteria are specified throughout the world in terms of concentrations of fecal indicator organisms because fecal matter can be a major source of pathogens in ambient water and because it is not practical or feasible to monitor for the full spectrum of all pathogens that may occur in water.”) EPA further determined that there is “limited evidence . . . that recreational water contaminated with animal fecal material is less risky to swimmers than recreational water contaminated with human fecal material.” *Id.*

4. While Defendants assert that their arguments and evidence concerning as yet unarticulated future water quality standards are not speculative, their own Response belies this assertion. For instance, Defendants aver that: (a) a panel of experts convened by EPA to evaluate the research needs for development of revised standards “recommended research be conducted on a variety of approaches which were ***not limited to the use of indicator bacteria***”; (b) “EPA would not expend millions of dollars of research questioning and evaluating the reliability of its own guidelines for determining risk to human health from bacteria if it did not consider it important to revise those standards”; and (c) “EPA has stated it ***intends*** on releasing a new standard in **2012**.” Response at 5 (emphasis added). These statements show that Defendants do not know whether any revised AWQC will dispense with the use of indicator bacteria and that if

any such revised AWQC are ever issued, they will be issued in 2012 or later, well after this case has been tried. Therefore, Defendants' arguments and evidence concerning these as yet unarticulated future water quality standards are patently speculative and should be precluded as such. What is more, as shown by the above-quoted EPA white paper from February 2009, it is far from certain that any future water quality standards will dispense with the use of indicator bacteria to assess recreational aquatic health risks associated with zoonotic sources. Most importantly, Defendants' predictions have no bearing on the pertinent issue of whether the waters of the IRW pose an unacceptable health risk under the only current and applicable standards mandated by Oklahoma law. Defendants' speculation about as yet unarticulated future standards can only serve to confuse the true issues in this case.

WHEREFORE, premises considered, the State respectfully requests that the Court grant its Motion in Limine Pertaining to As Yet Unarticulated Future Water Quality Criteria.

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